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No. 10-1043

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

ALEJANDRO HERNANDEZ,

Petitioner,

v.

JESUS TERRONES, GUILLERMO MARTINEZ, ARTURO RUIZ, JR., ANTONIO TABULLO, JOE ZIMMERLY, AND PEDRO OCEGUEDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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March 21, 2011

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QUESTION PRESENTED

Whether the Supreme Court of the United States is going to expand a cause of action for claimed violation of 42 U.S.C. § 1983 constitutional rights beyond well established case law concerning the Fourth Amendment and Fourteenth Amendment of the United States Constitution to include non-constitutional rights claims for reckless investigation or to require law enforcement investigators to continue their investigation through the trial of the case.

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STATEMENT OF THE CASE

In a well reasoned, thorough opinion, the Fifth Circuit Court of Appeals correctly ruled that there was no Fourth Amendment violation, that there was no Fourteenth Amendment violation, and that in 1994, reckless investigation was not a clearly established stand alone constitutional right.

REASONS FOR DENYING THE PETITION

I. The Lower Court's Ruling Granting Respondents' Qualified Immunity Does Not Warrant Review By This Court.

A. In The Proceedings Below, It Was Decided That The Claim Against Respondents Implicated The Fourth Amendment.

1. The core concept in civil rights litigation is that public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as from liability for civil damages under 42 U.S.C. § 1983 so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time they acted. *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

2. In this case, Petitioner is attempting to pound a square peg into a round hole. Petitioner's state court conviction was overturned because his criminal defense attorney was ineffective by not producing at trial the very things Petitioner is now claiming Respondents withheld. The Lower Court properly decided that the cognizable constitutional claim was Fourth Amendment probable cause and not a non-cognizable claim of reckless investigation. (Pet. App. 29a). The proper and correct factual background in this case was set out in the lower court's opinion. (Pet. App. 2a-12a).

Petitioner's continued reference to the Fifth Circuit's supposed standard – that the evidence obliterate any link between the Petitioner and the crime – is not a correct statement of the lower court's opinion. The paragraph in Petitioner's Appendix at page 29a on how a reckless investigation was not a clearly established stand-alone constitutional right violation at the time of the events in question in 1994 is not the complete sentence. After that phrase the lower court continues, "and because the incriminating evidence which remains was sufficient to support the existence of probable cause, Petitioner cannot demonstrate the violation of his constitutional right to be free from false arrest or illegal detention." (Pet. App. 29a).

B. The Facts In This Case Do Not Warrant Review By This Court For Resolving Conflicts In The Circuits.

1. This Court has held that to determine whether a Defendant's Fourteenth Amendment due process rights are violated by the admission of evidence at trial derived from unnecessarily suggestive identification procedures depends upon the totality of the circumstances surrounding those procedures. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), this Court described the standard under the Due Process Clause as one of fairness, and identified the interest protected in Stovall as evidentiary. *Manson*, 432 U.S. at 113. This Court noted that a "suggestive pre-indictment identification procedure does not in itself intrude upon a constitutionally protected interest," *Id.* at 113 n. 13, and held that "reliability is the linchpin" in determining the admissibility of such identification testimony, *Id.* at 114. In assessing the reliability of an identification and evaluating whether there exists a high likelihood of misidentification, a number of factors should be considered. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). This analysis is in turn determinative of whether the evidence should be permitted to go to the jury. See *Biggers*, 409 U.S. at 201. Both *Stovall* and *Manson* reflect "the concern

that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Manson*, 432 U.S. at 112 (emphasis added).

"It is undisputed that Carreon invoked his Fifth Amendment right against self-incrimination, and refused to testify at both Petitioner's examining trial and trial. His identification of Petitioner was not the sole basis for the probable cause determination in seeking Petitioner's arrest and detention." (Pet. App. 34a). Since Carreon's identification was never introduced at either the examining trial or trial, and did not serve as the basis for his continued detention or eventual conviction at trial, Petitioner's due process rights were not violated. Petitioner's argument that Carreon's pretrial identification of Petitioner was either unduly suggestive or intentionally manipulated, is immaterial because the identification was not "clearly critical" to the probable cause determination supporting Petitioner's arrest and detention, nor was it ever admitted into evidence at trial. (Pet. App. 34a).

2. Furthermore, the record reflects, that Petitioner was present and overheard Carreon's recantation of his identification of Petitioner as they were both being driven to the magistrate on the night of their arrest. It is also clear that Petitioner's criminal defense counsel knew of the presumed recantation before his trial in October 1994, and at least as early as May 24, 1994, the date of Petitioner's examining trial. (Pet. App. 8a, 42a and 43a).

C. Respondents Did Not Violate Their Fourteenth Amendment *Brady* Obligations.

1. Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the government must disclose material, exculpatory evidence to a criminal defendant. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) (citing *Brady*, 373 U.S. at 87). "A valid Brady complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." *Moore v. Illinois*, 408 U.S. 786 (1972). Impeachment as well as exculpatory evidence fall within Brady's purview. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"Evidence is not 'suppressed' if the Defendant 'knows or should know of the essential facts that would enable him to take advantage of it.'" *United States v. Mulderig*, 120 F.3d 534 (5th Cir. 1997); *United States v. Shoher*, 555 F.Supp. 346, 352 (S.D.N.Y. 1983). "When information is fully available to a Defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980), citing *Giles v. Maryland*, 386 U.S. 66, 98 (1967).

2. The failure to disclose evidence which is cumulative does not present a *Brady* violation. *Allridge v. Scott*, 41 F.3d 213, 218 (5th Cir. 1994). Fernando

Antonio Garinian testified at Petitioner's trial that he had never seen Petitioner before. Laura Cortazar, Petitioner's girlfriend, testified that she did not know Carreon and had only heard of him in connection with this case. Petitioner himself testified that he did not know Carreon. (Pl. App. 38a). Nondisclosure of information that is merely repetitious, cumulative, or embellishing of facts otherwise known to defense does not result in a *Brady* violation. *Giles v. Maryland*, 386 U.S. at 98.

3. Petitioner's criminal defense counsel knew or should have been aware of Robert Hernandez's identity prior to the trial based on the district attorney's open file policy. Robert Hernandez was not called to testify as a witness by either side. The record is silent on what attempts, if any, Petitioner's defense counsel made to interview Robert Hernandez prior to trial. (Pl. App. 40a). Therefore, there was no *Brady* violation.

II. Certiorari Is Not Warranted To Address Any Of The Claimed Circuit Conflict Issues Raised By The Petition.

A. This Case Does Not Present The Sort Of Clear, Well Established And Fully Aired Conflict That Warrants Review By This Court.

The cases Petitioner relies on in his Petition are not the same or similar as the facts in this case, where all known exculpatory evidence was present in

the prosecutor's file, but the Petitioner's criminal defense attorney did not make use of or present any evidence concerning any of the defensive issues.

B. There Was No Withholding Of Substantial Exculpatory Evidence By Respondents.

1. On May 14, 1994, later in the day after Petitioner was arrested for the murder, Sgt. Ocegueda received a telephone call from Dee "Baby" Stewart, who advised that a man named Brandon Hamilton had bragged to him about the murder (Pet. App. 9a).

2. On the same day, Hamilton was located and brought to police headquarters for an interview. He denied involvement in the murder but admitted that he had spoken with Cobb a day or two prior to the murder and acknowledged that he had touched some of the items in the vehicle of the deceased as well as the outside of the car. (Pet. App. 10a).

3. Police obtained Hamilton's fingerprints and released him without taking his statement. Two days later police learned that Hamilton's fingerprints were a positive match for the latent fingerprints which were found on the car. (Pet. App. 10a).

4. On May 27, 1994, police obtained a formal statement from Stewart, which detailed his allegations. (Pet. App. 10a).

5. On June 3, 1994, police took Hamilton into custody and obtained a formal statement from him. (Pet. App. 10a).

6. On June 10, 1994, Hamilton was transported to a medical center where his body fluids and blood samples were submitted for testing (Pet. App. 11a).

7. On May 24, 1994, at Petitioner's Examining Trial, his attorney advised the Magistrate Judge that he intended to call Carreon as a witness for the purpose of repudiating his identification of Petitioner as a co-participant in the murder. Carreon invoked his Fifth Amendment right not to testify. (Pet. App. 11a).

8. Petitioner's criminal trial commenced on October 17, 1994. Carreon again invoked his Fifth Amendment right not to testify and his identification of Petitioner was never introduced at trial. (Pet. App. 12a).

9. At the trial, Laura Cortazar, Fernando Antonio Garinian, a friend of Carreon, as well as Petitioner himself, all testified to the fact that Petitioner and Carreon did not know each other. (Pet. App. 12a).

10. After serving nearly 13 years of a 99-year sentence, Petitioner obtained Habeas Corpus relief on grounds of ineffective assistance of counsel. (Pet. App. 12a).

C. This Case Is Not The Same Or Similar To Any Of The Other Cases Cited By Petitioner As Raising A Conflict In The Circuits.

1. There is no manufactured false evidence created by law enforcement in this case. There are no actions by the police that shock the conscience.

2. The cases cited by Petitioner (all but two which are post-1994) deal with willful, intentional, malicious conduct, which is not present here.

3. This Court has always been reluctant to expand the concept of substantive due process. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The Court also exercises the utmost care whenever asked to break new ground in this field. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). This Court should stay true to these concepts and decline to accept Writ of Certiorari in this case.

CONCLUSION

Because this case was decided in accordance with well established precedent of this Court and because the facts in this case do not present a conflict with other circuits, and for the reasons and based on the authorities cited herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 21, 2011